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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION

Case No. 4:23-cv-3450

Plaintiff,

**PLAINTIFF'S REPLY TO
DEFENDANTS' SUPPLEMENTAL
DECLARATION (ECF NO. 57)**

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT; UNITED
STATES DEPARTMENT OF HOMELAND
SECURITY.

Defendants.

I. INTRODUCTION

2 In this Freedom of Information Act (“FOIA”) case, the government has refused to release
3 a copy of electronic law library materials provided by Immigration and Customs Enforcement
4 (“ICE”) to detained immigrants. The government argues that the requested records are not
5 “agency records” under FOIA, claiming that ICE has no control over the requested materials
6 because they are subject to the terms of a “Master Agreement” that restricts the agency’s ability
7 to use and dispose of the records. ECF No. 40 at 11; ECF No. 42 at ¶¶ 5-6; ECF No. 42-1. Plaintiff,
8 however, has argued that the Master Agreement initially provided by the Defendants, which
9 applies to Reed Elsevier, Inc. and is dated with the year 2010, does not actually apply to the
10 requested electronic law library materials, developed by Relx, Inc. in 2022. Plaintiff has further
11 argued that the government has provided no evidence to show that it is actually bound by the
12 terms of the Master Agreement. ECF No. 44 at 16-17. After oral argument, on June 27, 2024, the
13 Court ordered Defendants to submit a supplemental declaration supporting their claim that the
14 LexisNexis Master Agreement governs the contract between ICE and Relx, Inc. for the electronic
15 law library. ECF No. 51.

16 Like the government’s prior filings, the supplemental declaration and new version of a
17 Master Agreement fail to satisfy the government’s burden. ECF Nos. 57, 57-1. First, the
18 government fails to show that it is bound by the terms of its new version of the Master Agreement.
19 Like the previous version, this new Master Agreement again appears to apply to Reed Elsevier,
20 not Relx, Inc., which ceased to exist as of 2015, over seven years before Relx signed the operative
21 contract with ICE. ECF No. 44 at 16. Second, the key claims upon which the government relies
22 in the supplemental declaration are based on statements that lack personal knowledge, are
23 inadmissible hearsay, and do not meet the requirements of Federal Rule of Civil Procedure
24 56(c)(4). Lastly, Defendants have failed to introduce evidence to show that the person who
25 purportedly bound the government had authority to obligate the government to the Master
26 Agreement. Defendants have failed to meet their burden of proof with the supplemental
27 declaration, and their summary judgment motion should fail.

II. ARGUMENT

A. Defendants' New Version of the Master Agreement Does Not Apply to the Electronic Law Library.

Defendants initially provided a Master Agreement that purportedly applied to the requested materials. ECF No. 42-1. However, this initial version clearly did not govern, as it applied to a “LexisNexis® CD” with “copyright © 2010 LexisNexis®, a division of Reed Elsevier Properties, Inc.” ECF No. 42-1 at 1. As Plaintiff noted, Reed Elsevier ceased to exist in 2015, and the Master Agreement applied to a “LexisNexis CD,” although the Defendants claimed that the requested materials are not provided on CD-ROM. ECF No. 44 at 16.

Defendants’ new version of the Master Agreement does no better. In the supplemental declaration, Mr. Shawn O’Donnell states that “ICE examined an [Electronic Hard Drive] provided by RELX and located the Microsoft Word file containing the Master Agreement, which came preinstalled on the [Electronic Hard Drive] and which appears as part of the installation process.” ECF No. 57 ¶ 9. He then explains that “[a] true and correct copy of that Microsoft Word file, which has been printed to pdf, is attached hereto as Exhibit A.” *Id.* This new version of the Master Agreement, however, suffers from the same fatal deficiencies as the former version. Like the former version, this new Master Agreement specifies that it applies to a “LexisNexis® CD,” not an External Hard Drive. ECF No. 57-1 at 2. Furthermore, this new version does not refer to Relx, but rather, refers to LexisNexis as a “division of Reed Elsevier Inc.” ECF No. 57-1 at 10 (¶ 10.4). As Plaintiff has already noted, Reed Elsevier ceased to exist in 2015, over seven years before Relx signed the operative contract with ICE. ECF No. 44 at 16. Defendants again fail to meet their burden of proof.

B. Critical Portions of the Supplemental Declaration Fail to Meet the Requirements of FRCP 56(c)(4).

A close examination of the supplemental declaration reveals that critical portions necessary for Defendants to meet their burden of proof fail to meet the requirements of Federal Rule of Civil Procedure 56(c)(4), as they are not based on personal knowledge, are based on

1 inadmissible hearsay, or are conclusory or speculative. Rule 56(c)(4) requires that a declaration
 2 or affidavit submitted by a party “to support or oppose” a motion for summary judgment “must
 3 be made on personal knowledge [and] set out facts that would be admissible in evidence.” Fed.
 4 R. Civ. P. 56(c)(4). “Statements in affidavits that are legal conclusions, speculative assertion, or
 5 statements of hearsay evidence do not satisfy the standards of personal knowledge, admissibility,
 6 and competence required by Rule 56(c)(4).” *Wilson v. Fox*, No. 2:16-cv-0219JAMACP, 2019
 7 WL 1098993, at *6 (E.D. Cal. Mar. 8, 2019) (citing to *Soremekun v. Thrifty Payless, Inc.*, 509
 8 F.3d 978, 984 (9th Cir. 2007)); *see also Trentadue v. United States Cent. Intel. Agency*, No. 2:08-
 9 CV-0788, 2013 WL 12291523, at *1 (D. Utah Sept. 9, 2013) (striking government’s declaration
 10 for lack of personal knowledge in FOIA case, noting “inconsistencies over time in the
 11 Government’s representations”). Courts “have rejected as impermissible hearsay” agency
 12 declarations based on “out-of-court statements by private third parties.” *Ecological Rts. Found.*
 13 *v. U.S. Env’t Prot. Agency*, 541 F. Supp. 3d 34, 49 (D.D.C. 2021) (citing multiple cases); *see also*
 14 *Humane Soc ’y of U.S. v. Animal & Plant Health Inspection Serv.*, 386 F. Supp. 3d 34, 44 (D.D.C.
 15 2019) (declining to consider government affidavit relying on third-party submissions to justify
 16 an agency’s withholding under FOIA).¹

17 As an initial matter, Mr. O’Donnell consistently fails to demonstrate personal knowledge
 18 for statements or conclusions made throughout the declaration. This failure is particularly fatal,
 19 as statements most critical to the case are not based on his own personal knowledge, but that of
 20 others, including third parties. As Mr. O’Donnell explains in Paragraph 6, “[i]n response to the
 21 Court’s June 27, 2024 order, I made further inquiries to the contract officer responsible for the

22 ¹ In a FOIA case, hearsay is permissible in an affidavit or declaration when courts are “assessing
 23 the adequacy of the agency’s search.” *Ecological Rts. Found.*, 541 F. Supp. 3d at 49 (citation
 24 omitted); *see also Garris v. Fed. Bureau of Investigation*, 937 F.3d 1284, 1293 (9th Cir. 2019).
 25 However, there is no distinct Rule 56 personal knowledge standard for FOIA cases, particularly
 26 where, as here, the agency affidavit goes beyond an inquiry regarding search adequacy. *See*
 27 *Ecological Rts. Found.*, 541 F. Supp. 3d at 48 (noting that the “suggestion that the personal-
 28 knowledge requirement somehow applies differently or more leniently in a FOIA case than in
 other legal contexts is just wrong.”). Rather, the permissibility of hearsay evidence to
 demonstrate search adequacy is based on the “generally applicable standard for personal
 knowledge under Rule 56,” in consideration of a FOIA officer’s “knowledge of the procedures
 used in handling [a FOIA] request and his familiarity with the documents in question.” *Id.* at 47
 (citation omitted) (alterations in original).

1 RELX Contract. We searched for additional records, including any prior agreements or contract
 2 drafts, and communications related to the agreement. *We also contacted RELX for additional*
 3 *information.*” ECF No. 57 ¶ 6 (emphasis added).

4 For example, at Paragraph 8, Mr. O’Donnell asserts he was “able to confirm that
 5 acceptance of the Master Agreement by ICE occurs as part of the installation of the Offline Lexis
 6 Materials.” *Id.* at ¶ 8. This conclusory statement, however, lacks any information as to the basis
 7 of his personal knowledge. Mr. O’Donnell, for example, does not clarify whether he or another
 8 agency employee observed installation of these electronic materials, or whether RELX provided
 9 this “confirmation.” Nor does he explain the basis for his knowledge of the next two sentences in
 10 the paragraph. To conclude the paragraph, Mr. O’Donnell makes another speculative, hearsay
 11 statement: “It is my understanding that the installer must, and always does, accept the terms of
 12 the Master Agreement during the installation process, and that this has been occurring throughout
 13 the life of the RELX Contract.” *Id.* Notably, Mr. O’Donnell does not claim to have first-hand
 14 knowledge of this information. *Contra id.* at ¶ 9 (“I conducted a comparison of the language of
 15 Master Agreement...”). Mr. O’Donnell’s statement is not based on his own personal knowledge,
 16 and he provides no information as to how he came to this understanding or the source of this
 17 specific information, including a third party.

18 In Paragraph 11, O’Donnell similarly fails to fully explain who provided the answer to
 19 the “inquiries” that formed the basis of his “understanding” that “the Master Agreement has been
 20 included with the [External Hard Drive] and each quarterly update provided by RELX dating
 21 back to prior contracts” since “at least 2012.” *Id.* ¶ 11. Notably, Mr. O’Donnell has only occupied
 22 his position at ICE since May 24, 2020, and makes this claim without explanation as to his
 23 personal knowledge of the claim. *Id.* at ¶ 1. Nor does Mr. O’Donnell identify whether this
 24 information originated in an official document, or from RELX, a third party. Likewise, in
 25 Paragraph 12, Mr. O’Donnell can only speculate to whether any changes have occurred to the
 26 Master Agreement “over the course of the relationship between ICE and RELX.” *Id.* at ¶ 12.

1 These statements fail to meet the requirements of Rule 56(c)(4), and are insufficient evidence at
 2 summary judgment.

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4 **C. The Government's Supplemental Declaration Fails to Provide Evidence Showing
 That It Is Bound by the Terms of the Master Agreement.**

5 Defendants also fail to submit any admissible evidence to identify the person who bound the
 6 government to the terms of the Master Agreement or their actual authority to do so. "A contract
 7 with the United States...requires that the Government representative who entered or ratified the
 8 agreement had actual authority to bind the United States." *Trauma Serv. Grp. v. United States*,
 9 104 F.3d 1321, 1325 (Fed. Cir. 1997). In Paragraph 8, Mr. O'Donnell claims, without attribution
 10 to source, that he was "able to confirm that acceptance of the Master Agreement by ICE occurs
 11 as part of the installation of the Offline Lexis Materials." ECF No. 57 at 2. O'Donnell's
 12 speculative and conclusory assertion continues: "[T]he Offline Lexis Materials and associated
 13 software are installed by *an ICE employee* at the ICE facility where the Offline Lexis Materials
 14 are used." *Id.* at 2-3 (emphasis added). These statements lack personal knowledge and are based
 15 on impermissible hearsay. Even more critically, Defendants provide no information, including
 16 qualifications, responsibilities, or titles of the ICE employees otherwise sufficient to demonstrate
 17 that the installer has the ability to bind the government to an agreement. Defendants'
 18 supplemental declaration fails to provide sufficient evidence at summary judgment.

19 **III. CONCLUSION**

20 For the aforementioned reasons, Defendants' supplemental declaration and new version
 21 of the Master Agreement fail to meet their burden of proof at summary judgment.

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1 Dated: August 19, 2024

Respectfully submitted,

2 /s/ Marisol Dominguez-Ruiz

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